Nos. 87-826, 87-1101

In The Supreme Court of the United States

October Term, 1987

JEROME F. GOLDBERG and ROBERT McTIGUE,
Appellants,

v.

ROGER D. SWEET,
DIRECTOR OF THE ILLINOIS
DEPARTMENT OF REVENUE, *et al.*,
Appellees.

GTE SPRINT COMMUNICATIONS CORPORATION,
Appellant,

v.

ROGER D. SWEET,
DIRECTOR OF THE ILLINOIS
DEPARTMENT OF REVENUE, *et al.*,
Appellees.

On Appeal From The Supreme Court Of Illinois

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE MCI TELECOMMUNICATIONS CORPORATION IN SUPPORT OF AFFIRMANCE

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MOTION OF AMICUS CURIAE MCI TELECOMMUNICATIONS CORPORATION FOR LEAVE TO FILE BRIEF IN SUPPORT OF AFFIRMANCE

Pursuant to Supreme Court Rule 36.3, MCI Telecommunications Corporation ("MCI") moves for leave to file the accompanying brief as *amicus curiae* in support of affirmance.

MCI Telecommunications Corporation owns and operates the world's second largest communications network. MCI's long distance offerings permit customers to call every telephone in the United States and in 146 foreign countries. MCI provides communications employing state of the art fiber-optic cable, digital microwave, and satellite communications technologies. Currently, MCI is subject to a multiplicity of taxes on various types of intrastate and interstate calls.

MCI has three distinct interests affected by this case. First, and most obviously, it has an interest in minimizing the tax burden on its customers by eliminating any multiple taxation of telecommunications. Second, it has an interest in minimizing the costs to itself and its customers of administering and complying with State taxes by promoting forms of taxation which are easy to administer and comply with. MCI believes that the Illinois telecommunications tax represents a form of taxation which most efficiently reduces the risk of multiple taxation while minimizing administrative burdens. Thus, the Illinois tax is the least objectionable type of tax on telecommunications and MCI has an interest in having its constitutionality upheld.

Third, MCI has an interest in the reduction of the currently prevailing uncertainty of the constitutional standards in this area, which will minimize future litigation and allow governments to select the least onerous of the permissible methods of taxation. MCI believes that the wide variations in the forms of taxation now imposed by State and local governments result in part from uncertainty as to what forms of taxation are constitutionally permissible. The very variety of disparate taxes with which MCI must deal imposes additional burdens upon it.

Moreover, during the pendency of litigation such as this, injunctions are sometimes issued requiring MCI to maintain extensive records, not otherwise necessary to its business, in order to facilitate distribution of refunds among its customers should the tax be found invalid. All of these burdens would be ameliorated by greater certainty as to the constitutional standards. Finally, MCI may be compelled to incur substantial administrative costs if a refund is necessary in this and other cases.

MCI was named as a party in the courts below. This makes MCI a party under Rule 10(4) of the Court, inasmuch as the Rules do not differentiate between named, active, nominal or financially interested parties. MCI's role in the case is that of a named party who is absorbing a substantial and costly administrative burden in acting as a conduit for collection and transmission of the tax from its customers to the State of Illinois. MCI filed an answer and a counterclaim in the trial court in order to take advantage of a statutorially created escrow fund with the Treasurer of the State of Illinois in the event the tax is found invalid and a refund is necessary. Finally, MCI may be involved administratively in the event a refund is necessary.

While MCI's direct interest in this case, as a cross-claiming defendant, tends to be aligned with those of appellants, MCI is nevertheless supporting the position of appellees in order to advance its customers' and its own broader interests in eliminating multiple taxation while minimizing the burdens of administering and complying with State and local taxation. Therefore, MCI believes that it is more appropriate that it participate in this case as an *amicus curiae* rather than as a party.

MCI believes that it is important that application of established legal standards to this case be enlightened by an understanding of the practicalities of the telecommunications business in which MCI is engaged. Appellants have failed to address important practical aspects of that business and have made statements about other aspects which appear susceptible to misunderstanding. Appellees, officials of the State of Illinois, are not fully conversant with these practicalities and are therefore not able

to address them as fully as MCI. Moreover, MCI wishes to present certain arguments regarding the legal significance of these practical realities and of the economic impact of the tax which the State of Illinois has not presented or has presented less fully than MCI believes they deserve.

MCI has sought the consent of counsel for appellants and counsel for appellees for leave to file the accompanying brief. Counsel for appellant GTE Sprint Communications Corporation denied this request.

For the foregoing reasons, MCI prays that the Court grant its request for leave to file the accompanying brief.

Respectfully submitted,

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QUESTION PRESENTED

Where a State imposes a tax of 5% of the purchase price on purchases of all telephone calls originating or terminating in the State and charged to telephones located in the State, is the State constitutionally required to attempt to apportion the charges for individual interstate phone calls between charges for in-state facilities and those for out-of-state facilities even though:

(1) the unapportioned tax on the purchasers of the calls is economically equivalent to a validly apportioned gross receipts tax on the seller of the calls;

(2) there is no evidence that there is any practicable way to make a meaningful apportionment of charges for individual phone calls among the States involved in transmitting those calls;

(3) each interstate telecommunication would be taxed only once if the same tax were adopted by every State;

(4) the tax provides a credit for any taxes imposed on the purchase of the same call by any other jurisdiction;

(5) the tax is imposed equally on purchases of intrastate and interstate phone calls; and

(6) the tax is reasonably related to services rendered by the State to the purchaser of the calls?

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STATEMENT OF THE CASE

Because established commerce clause principles must be applied in light of the technological realities of modern telecommunications, the structure of interstate telecommunications networks will be addressed before describing the tax at issue.

Interstate Telecommunication Networks

A number of carriers compete with one another in the interstate telecommunications market. These include MCI, appellant GTE Sprint Communications Corporation ("GTE Sprint"), and all of the other carriers named as defendants in this case except Illinois Bell Telephone Company.[1] Each of them, like GTE Sprint, has "established over the years and at great expense, its own interstate transmission network comprised of microwave radio, fiber optic, satellite and cable facilities, spread over numerous states." (GTE Sprint Br. 3.) Of course, it is self-evident that the actual satellites involved in these networks are in outer space, beyond the territory of any State.

As telecommunications are placed by customers and enter such a network, they are routed by computers which attempt to maintain optimal use of all of the various facilities in the network. The routing selected for a given call depends on the usage of the network when the telecommunication is received, so that various communications between the same two points may utilize many different routings. Thus, one telecommunication from Chicago to New York might proceed by a ground circuit directly connecting the two cities and passing through Indiana, Ohio, Pennsylvania, and, perhaps, New Jersey. If such direct circuits are all busy or otherwise unavailable, another telecommunication may be routed, in part, through Michigan, Wisconsin, Canada, or any of a virtually infinite variety of less direct, but available, circuits. Alternatively, the telecommunication might be transmitted directly from Illinois to New York via satellite,

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[1] Illinois Bell is a local exchange carrier which does not itself provide interstate telecommunications service, although it does provide "access" connections between its own customers and interstate carriers.

without passing through any State other than the States of origination (Illinois) and termination (New York).

The number of telecommunications which must be routed is staggering. During 1987, MCI alone was carrying an average of 6,901 long distance telecommunications per minute for each minute of a 24-hour day. The industry as a whole was carrying over 69,000 such telecommunications per minute.

MCI has no existing means of determining how any particular prior communication was routed or of routinely recording the routing of a current communication. So far as MCI is aware, no other carrier has the ability to make such determinations or records. Thus, MCI believes that it is literally impossible at the present time to meaningfully apportion the charge for a particular call among the States through which that call was transmitted, for there is no way to ascertain the identities of those States. Moreover, the very number of calls involved demonstrates that, even if it were technically feasible to record and analyze routinely the routing of every call, the time, equipment, and expense involved for the carriers would be enormous.

Surely nothing in this record even suggests that such call-by-call apportionment would be even theoretically possible, let alone practically feasible. To the extent that appellants assert otherwise,[2] the record simply fails to support that assertion. Appellants' sole reliance in this regard is on a single paragraph in an affidavit submitted by one of GTE Sprint's attorneys, Richard Wiley:

> GTE Sprint has the administrative capability to bill taxes to its customers on telecommunications services which originate in any state, or terminate in any state, or are billed in any state, or any combination of these criteria for any number of states. Specifically, GTE Sprint has the administrative capability to bill more than one state's tax to a single customer for a single communication. For example, GTE Sprint can bill an Illinois customer for an interstate telecommunication originating in Illinois and terminating in New York, and could include, in that charge, a tax assessed by Illinois, the originating state, and New York, the terminating state.

[2] Appellants Goldberg and McTigue (collectively, "Goldberg") assert that "carriers now have the capability to bill each telephone customer for whatever tax each participating State chooses to levy on its proportionate share of each call charged to the customer's account." (Goldberg Br. 30 n.24.) GTE Sprint asserts that it is capable of billing "any tax assessed by any one state on the call's transmission path." (GTE Sprint Br. 4.)

(GTE Sprint J.S. App. 9a.)

All that this paragraph actually says is that GTE Sprint, like MCI and other carriers, could put line items on its bill for as many State taxes as might be applicable. It does not say, or even suggest, that GTE Sprint could apportion the charges for individual calls among the States (or even identify the relevant States), for purposes of computing such taxes, on any basis reflecting the actual routings of those calls. Indeed, nowhere in their briefs do any of the appellants suggest any method of apportioning the charges for individual calls other than purely arbitrary formulas. As a result, MCI believes that a constitutional requirement for the sort of apportionment appellants appear to demand would render it impossible for any State to impose a meaningful tax on purchases of interstate telecommunications.

The Illinois Telecommunications Excise Tax

Illinois imposes a tax upon retail purchasers of both intrastate and interstate telecommunications. Telecommunications Excise Tax Act ("Act"), §§3-4, Ill. Rev.Stat. ch. 120, ¶¶ 2003-04 (reprinted as Appendix F to the Jurisdictional Statement of Goldberg ("Goldberg, J.S.)) The seller of the telecommunication service is obliged to collect the tax from the purchaser by adding the tax to the charge billed to the purchaser and to remit the tax to the State. Act, § 5.[3]

[3] As is customary for sales taxes, a seller which fails to collect the tax is made liable for the amount not collected. Act, § 5. This provision is the basis for the payment by GTE Sprint of $400,000 of its own funds for calls where it fails to collect the tax. (GTE Sprint Br. 9.)

No tax is imposed on an interstate telecommunication unless the telecommunication purchased is either originated or received in Illinois. Act, § 4. Regardless of whether the telecommunication is intrastate or interstate, the tax is "5% of the gross charge for such telecommunication" made by the retailer from whom it is purchased. *Id.* The "gross charge" on which the tax must be paid means the "amount paid" for the telecommunication, subject to certain statutory exclusions.[4]

The "amount paid" is defined to be the amount "charged to the taxpayer's service address in this State." Act, § 2(b). By customary usage in the industry, a "service address" is the location of a telephone or other telecommunications device and is not necessarily the same as the address to which the bill is sent. For example, an individual with a telephone at his vacation home (the service address) might have the bills for that telephone sent to his primary residence (the billing address). Similarly, a corporation with many offices might have the phone bills for all of them sent to its headquarters. For purposes of the Illinois tax, only the location of the service address is significant, so it does not matter where the bills are sent or where they are paid. That is, a call originating or terminating in Illinois is taxable if and only if it is "charged to a service address in [Illinois], regardless of where [it] is billed or paid."[5] Act, § 2(b).

In the normal course of events, a telecommunication is "charged" to the telephone or other device from which the purchaser originates the communication, and the location of that device is the relevant service address. For collect communications, the charge is made to the service address at which the purchaser receives the communication. By use of a credit card or similar arrangement, a purchaser can arrange to have a call charged to a service address other than those where the call is originated or received. But for any taxable communication, the purchaser must both have an Illinois service address and in some way cause the communication to be charged to a telecommunications device at that address. Otherwise, there will be no "amount paid" to be subjected to the Illinois tax, even when an interstate call originates or terminates in Illinois.

Thus, Illinois has not attempted to tax any telecommunications which merely pass through Illinois on their way between other States. Nor has it attempted to tax interstate calls originating or terminating in Illinois if they are charged to telephones located elsewhere. Illinois has not even attempted to tax telecommunications charged to Illinois telephones unless those telecommunications either originate or are received in Illinois.

Moreover, with respect to interstate telecommunications, the Act provides a credit to further protect against multi-state taxation of the same taxable event. Any taxpayer who pays taxes in both Illinois and another State on the same call may claim a credit against the Illinois tax in the "amount of such tax properly due and paid in such other state." Act, § 4.

Procedure Posture

The procedural history of this case is adequately addressed in the briefs of the parties. The interest of *amicus curiae* is set forth in MCI's motion for leave to file this brief. The reasoning of the trial court in holding the tax invalid and of the Illinois Supreme Court in reversing and upholding the tax will not be set forth in this brief because MCI does not rely upon or endorse that reasoning. However, the Court reviews judgments, not opinions, and must affirm the judgment if it is correct, even if the reasons why it is correct are different from those advanced by the courts below. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 & nn. 7-8 (1984). For the reasons stated

[4] Section 2(a) of the Act defines "gross charge" and specifically excludes amounts billed to the purchaser for (1) certain other taxes, (2) charges for certain collect telecommunications, (3) charges for certain data processing services, and (4) charges for customer equipment.

[5] While some loose language in the Illinois Supreme Court's Opinion (Goldberg J.S. App. 10a, 11a) suggests that the place of billing or payment might be significant, the statute expressly provides otherwise and the parties all recognize this. (Goldberg Br. 3; GTE Sprint Br. 5, 14, 19, 29; Consolidated Mo. to Affirm 5-6 & n.4.)

herein, MCI believes that the judgment of the Illinois Supreme Court was correct.

SUMMARY OF ARGUMENT

A proper decision in this case involves application of well-settled Commerce Clause jurisprudence to the scientific advancements of the third century of our nation's and its Constitution's existence. The issue before the Court arises in the context of a monumental change in technology. Transmission of messages from point A to point B is no longer accomplished solely by electric impulses over identifiable telephone lines. Rather, such transmissions now utilize computer selected routings for each telecommunication over ever-changing sets of circuits within a vast interconnected network. The routing of two consecutive communications between the same two points may be entirely different and there is no means in existence of recording how any particular communication is transmitted. Moreover, many communications are transmitted via satellites beyond the boundaries of any State. For these reasons, it is impossible for MCI – and, so far as MCI is aware, for any other carrier – to "identify that percentage of instate transmission activity and costs involved in each long distance call, and confine the Illinois tax to the corresponding percentage of the call's gross charge." (GTE Sprint Br. 31.) Appellants' suggestions that individual telecommunications be mathematically apportioned ignore both these technological realities and the Commerce Clause principles laid down by this Court.

The linchpin of appellants' argument is that the Illinois tax violates the Commerce Clause because it taxes the entire amount of each interstate telecommunication charged to an Illinois service address, rather than providing for a mathematical apportionment of the charge based on the proportionate involvement of Illinois facilities in delivering the telecommunication. Appellants claim that failure to apportion the tax mathematically: (i) creates a risk of multiple taxation of the same telecommunication by different States, (ii) causes the tax to discriminate

against interstate commerce, and (iii) eliminates any fair relation between the tax and the services provided by Illinois.

While the Illinois tax does not attempt to apportion the charges for the individual calls taxed, it carefully limits the scope of the tax imposed to provide the functional equivalent of apportionment. For Commerce Clause purposes, what matters is not the form of the tax, but its economic effect. While the tax here is a sales tax imposed on the purchaser of the call, the burden on commerce imposed by such a tax is economically equivalent to that imposed by a gross receipts tax on the seller of the call. The seller, of course, has gross receipts from many sources, but the tax would only apply to receipts from calls sold to Illinois service addresses. Thus, from the seller's perspective, the tax effectively would be a tax on all gross receipts with an apportionment among jurisdictions based on sales, and the Court has held that a gross receipts tax apportioned in that way is permissible under the Commerce Clause. Because the economic effect of the Illinois tax on interstate commerce is equivalent to the effect of a validly apportioned gross receipts tax, and because it is the economic effect which determines the validity of the tax, the Illinois tax is also valid.

This conclusion is reinforced by what MCI believes to be insurmountable administrative and technological barriers to meaningful mathematical apportionment. Because of the impracticability of determining the paths taken by individual calls and the vast differences in the level of State involvement among the various different modes of transmission utilized by modern networks, the modern, high technology realities of telecommunications do not permit the paths over which telephone messages are transmitted to be analogized to the relatively fixed (and readily determined) routes over which trucks or buses operate in a relatively uniform fashion. Thus, the rules for taxation of, for example, interstate motor carriers – whose approximate mileage in each State can be tallied and reported and whose mileage in one State is qualitatively similar to that in another – are not workable or appropriate for the minute-by-

minute taxation of interstate telephone calls whose individual routings through particular States, or in space outside the territory of any State, cannot practicably be traced or recorded and utilize a variety of dissimilar transmission methods with varying connections to individual States.

In contrast, it is administratively simple to allocate each call to the service address where it is charged and to compute the tax imposed at that location. Moreover, such an allocation limits the taxing State to only its fair share of the total telecommunications activity affecting it, so that the enormous expense and effort necessary even to attempt apportionment of individual calls would serve no purpose in fairly distributing taxing power among the States.

What is striking about the Illinois tax is that it achieves the objectives of Commerce Clause restrictions on State taxation, even though it does not provide for apportionment of individual calls. The Illinois scheme is designed both to avoid multiple taxation of the same telecommunication and to tax only a fair share of all the telecommunications activity conducted in or affecting Illinois. The tax is imposed only upon calls which an Illinois taxpayer elects to have charged to his service address in Illinois and thus fairly measures the protection and services Illinois provides to the taxpayer and the telecommunications equipment located at that address. For this reason, MCI submits that the Commerce Clause validity of the tax should be upheld as a meaningful adaptation of legislative methodology to technological innovation.

ARGUMENT

I. A STATE SHOULD BE PERMITTED TO TAX PURCHASERS OF INTERSTATE TELECOMMUNICATIONS BY ALLOCATING PARTICULAR CALLS ENTIRELY TO ITSELF SO LONG AS THE ALLOCATION METHOD IS ECONOMICALLY EQUIVALENT TO A VALID METHOD OF APPORTIONING A GROSS RECEIPTS TAX IMPOSED ON THE SELLER.

Since the Court's decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), it has been clear that the validity under the Commerce Clause of a State tax does not depend on its form, but rather on its "practical effect" based on "economic realities." *Id.* at 279; *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 404 (1984) (validity must be judged by "economic effect" of tax). Thus, the issue is "whether the tax produces a forbidden effect," such as preferring local business or subjecting interstate commerce to multiple, cumulative burdens of a sort not faced by local business. *Complete Auto Transit*, 430 U.S. at 288.

A. The Illinois Telecommunications Tax Is Economically Equivalent To a Gross Receipts Tax on Sale of Telecommunications to an Illinois Service Address.

The Illinois telecommunications tax is, both in form and in substance a sales tax imposed on the purchaser of the telecommunication. In terms of the burdens imposed on interstate commerce, such taxes are economically equivalent to gross receipts taxes imposed on the seller.

If the seller charges $1 for a particular telecommunication, the Act requires it to add a tax of five cents and collect $1.05 from the purchaser. To the extent that the increased cost to the purchaser results in reduced demand for telecommunications, the seller will be required to either accept the reduction in volume or reduce the charge for the telecommunication to fully or partially offset the effect of the tax. However, because all competing sellers of telecommunications are faced with the same tax, it does not alter their relative competitive positions, so any reduction

in volume will come only from communications either foregone entirely or diverted to slower methods such as the mails.

If a seller were instead faced with imposition of a gross receipts tax, maintenance of the seller's prior untaxed revenues from a call formerly costing $1.00 would require raising the price to a level which would net out to $1.00 after payment of the tax.[6] If the resulting price were $1.05, purchasers would be expected to react to such a price increase in exactly the same way they would react to an effective increase resulting from the addition of a five cent tax to a $1.00 selling price. Because the gross receipts tax represents a cost resulting specifically from the sale generating the receipts, it must be recovered by increasing the price of that sale or absorbed as an overhead item taking the form of reduced net receipts from that sale. Thus, the seller faces exactly the same choice (accepting reduced volume or absorbing part of the tax to limit the amount of the price increase) presented by imposition of a sales tax. Moreover, because all competitors are again faced with the same tax, the economic incentives will be the same in both situations.

Thus, both buyers and sellers should behave identically regardless of which form the tax takes. Accordingly, the "practical effect" on interstate commerce should likewise be identical, regardless of whether the tax takes the form of a sales tax or a gross receipts tax. *See, e.g.*, P. Samuelson and W. Nordhaus, *Economics* 387-89 and n.5 (12th Ed. 1985); *Gurley v. Rhoden*, 421 U.S. 200, 204 (1975).

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[6] To be precisely equivalent to a 5% sales tax, the gross receipts tax would have to require raising the price to $1.05. Because the tax base for a gross receipts tax includes the tax, while a sales tax is an addition to the seller's net price, the rate would differ slightly. Thus, the gross receipts tax rate equivalent to a 5% sales tax would be five cents on receipts of $1.05, a rate of roughly 4.76%. For any given sales tax rate, it is possible to compute an equivalent gross receipts tax rate.

B. The Court's Decisions Expressly Permit Gross Receipts Taxes To Be Apportioned on the Basis of the Location of the Delivery of the Purchase.

Had the Illinois telecommunications tax taken the form of a gross receipts tax on the revenues derived by the sellers from the same calls as are subject to the present sales tax, it would have presented a situation virtually identical to those considered by the Court in *General Motors Corp. v. Washington*, 377 U.S. 436 (1964), *Standard Pressed Steel Co. v. Washington Department of Revenue*, 419 U.S. 560 (1975), and in the portion of *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 107 S. Ct. 2810 (1987), dealing with out-of-state sellers challenging the tax on in-state sales.[7]

In *General Motors* and *Standard Pressed Steel*, the Court rejected challenges by out-of-state sellers to a Washington tax on the unapportioned gross receipts from sales of goods delivered in Washington, even though the sales resulted from manufacturing and distribution activities which predominantly occurred in other States. In *General Motors*, the Court noted that taxes measured by gross receipts from interstate commerce must be carefully scrutinized to guard against "the danger that such taxes can impose cumulative burdens upon interstate transactions which are not presented to local commerce." *Id.* at 440. "Nevertheless, . . . it is well established that taxation measured by gross receipts is constitutionally proper if it is fairly apportioned." *Id.*

The standard to be applied in determining whether a State tax is fairly apportioned was more fully summarized in *General Motors*:

> A careful analysis of the cases in this field teaches that the validity of the tax rests upon whether the State is exacting a constitutionally fair demand for that

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[7] *Tyler Pipe* did invalidate the application of the Washington tax to in-state manufacturers selling in other States and, in so doing, partially overruled *General Motors*. However, as explained at 12-13, *infra*, that aspect of *General Motors* is not relevant to the problem here, and *Standard Pressed Steel* was relied upon and fully reaffirmed.

aspect of interstate commerce to which it bears a special relation. . . . In other words, the question is whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded. . . . As was said in Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940), "[t]he simple but controlling question is whether the state has given anything for which it can ask return."

Id. at 440-41. *Accord Standard Pressed Steel*, 419 U.S. at 562.

Despite the fact that the tax was nominally "unapportioned and . . . therefore suspect," *General Motors*, 377 U.S. at 448, it was nonetheless upheld as applied to sales made to Washington customers. As applied to such sales, the Court found that the tax was "'apportioned exactly to the activities taxed,' all of which are intrastate." *Standard Pressed Steel*, 419 U.S. at 564. The Court distinguished *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939), where it had forbidden application of a similar Washington tax to sales made by Washington businesses and shipped to customers in other States. In the latter situation, the Court perceived a danger that the buyer's State would also impose an unapportioned sales or gross receipts tax, thereby subjecting interstate commerce to "the risk of a multiple burden to which local commerce is not exposed." 419 U.S. at 564.

The lesson of these cases is that restricting a gross receipts tax to receipts from sales made to customers in the taxing State is sufficient to constitute a fair apportionment of that tax. The Court later reaffirmed that rule and relied on it as a basis for holding that a State may validly apportion a net income tax solely on the basis of the taxpayer's sales in the various States from which it derives revenue. *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267, 280-81 (1978)

The portion of these cases pertinent here was carefully reconsidered and reaffirmed only a year ago in *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 107 S. Ct. 2810 (1987), although *General Motors* was overruled on another

point.[8] The Washington tax was imposed as a single tax on the act or privilege of engaging in business in Washington. Among the taxable activities were both manufacturing and selling in Washington. The tax was a percentage of sales arising from the Washington activity. The tax was challenged by both out-of-state manufacturers selling in Washington and Washington manufacturers selling out-of-state, both of which claimed to suffer discrimination in comparison with Washington manufacturers who sold in that State.

The source of the alleged discrimination was the fact that companies both manufacturing and selling in Washington were subject to only the single tax on their receipts, while companies manufacturing in one State and selling in the other were subject to both the Washington tax on their revenues and whatever tax was imposed by the other State on the activities conducted there. As to those manufacturing in Washington, and selling elsewhere, this Court found the tax invalid because it failed the test of "internal consistency" under which "'the [tax] must be such that, if applied by every jurisdiction, there would be no impermissible interference with free trade.'" 107 S. Ct. at 2816, *quoting Armco, Inc. v. Hardesty*, 467 U.S. 638, 644 (1984). (That test is discussed at 21-24, *infra*.) Thus, as in *Gwin, White & Prince*, this Court forbade application of the tax to sales made by Washington manufacturers for delivery in other States. Because all of the sales here are made to an Illinois service address, that aspect of the case is not relevant here.

However, as to out-of-state manufacturers selling in Washington, this Court again upheld the tax. 107 S. Ct. at 2821-22. In particular the Court squarely rejected the claim that a tax imposed on in-state sales was not fairly apportioned because the sales were the culmination of multi-state activity in manufacturing and distribution. Relying on *Standard Pressed Steel* and *Moorman Manufacturing Co.*, the Court reasoned that "whole-

[8] Some aspects of the analysis in *General Motors* were also disapproved, but this did not affect the result on the present issue.

saling – whether by an in-state or an out-of-state manufacturer – must be viewed as a separate activity [from the prior manufacturing and distribution] conducted wholly within Washington that no other State has jurisdiction to tax." *Id.* at 2822. Thus, *Tyler Pipe*, like the prior cases, held that a gross receipts tax may be imposed on all sales made for delivery in the taxing state but not on sales made from the taxing state for delivery elsewhere.

This result is eminently sound. It is generally recognized that the economic burden of either a sales tax or a gross receipts tax falls primarily on the purchaser of the goods or services sold. *See, e.g., Gurley v. Rhoden*, 421 U.S. 200, 204 (1975). Structuring such taxes so that they fall on purchasers in the taxing State serves a major purpose of the Commerce Clause: preventing exploitation of interstate commerce to shift tax burdens onto out-of-state interests powerless to participate in the local political process. *See, e.g., McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 45-46 n.2 (1940).[9] Moreover, such structuring fairly divides the tax base represented by sales among the States: each may tax the portion represented by purchases in its own territory. Were such taxes based on the location from which the goods were sold, as in *Gwin, White & Prince* and one portion of *Tyler Pipe*, then States which were net exporters would receive a disproportionate share of the revenue while a disproportionate share of the burden would fall in States which were net importers. Finally, structuring sales and gross receipts taxes on the basis of the location of the purchase is easily administrable and requires no complex accounting for individual transactions.

[9] As explained in *McGoldrick*, Commerce Clause jurisprudence is largely based on "the recognized danger that, to the extent the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state." 309 U.S. at 45-46 n.2.

Taxation of interstate telecommunications based on the location of the telephone or other device to which they are charged is closely analogous to taxation of ordinary sales based on the location. That location provides a unique nexus which fairly reflects the role of each State as a consumer of telecommunications.[10] It assures that a purchaser with a local presence, and an ability to participate in the local political process, will bear the burden of the tax. Finally, it provides the simplest mechanism administratively for division of this tax base among the States.

Thus, the Illinois tax is based on an allocation method (location of sales) which this Court has recognized as a permissible basis for apportionment of a gross receipts tax on interstate commerce. The Illinois tax is economically equivalent to such a permissible tax and the same reasoning shows that it fairly and simply divides the tax base among the States and prevents the shifting of tax burdens to the residents of other States. Thus, judging the Illinois tax by its "practical effects" and in light of "economic realities," that tax too should be found permissible under the Commerce Clause.[11]

[10] Insofar as some States may contribute to maintenance of interstate telecommunications networks to a greater extent than they consume the services of those networks, those contributions can be recognized through property taxes on telecommunications facilities, employment taxes on telecommunications personnel, or any of a variety of taxes based on the activities occurring in those States. The recognition in *Tyler Pipe* that out-of-state manufacture and distribution are separate from in-state sales for Commerce Clause purposes confirms that such taxes on the activities involved in maintaining interstate networks may be imposed without affecting any tax on the ultimate sale. Therefore, contrary to the implications of appellants' demand for apportionment in accordance with the respective facilities which each State contributes to a given call, disproportionate contributions to the telecommunications network ought not to be the basis for awarding States a constitutional entitlement to a disproportionate share of the revenues derived from consumption of telecommunications.

[11] In challenging the propriety of using the location of the service address as an apportionment mechanism, GTE Sprint relies (GTE Sprint

(Footnote continued on the following page)

II. WHERE A STATE IMPOSES A TAX ON PURCHASERS OF INTERSTATE TELECOMMUNICATIONS, ITS FAILURE TO ATTEMPT TO APPORTION THE CHARGES FOR INDIVIDUAL CALLS DOES NOT RENDER THE TAX INVALID WHERE THERE HAS BEEN NO SHOWING THAT MEANINGFUL APPORTIONMENT OF INDIVIDUAL CALLS IS PRACTICABLE AND THE STATE HAS TAKEN REASONABLE STEPS TO AVOID TAXING MORE THAN ITS FAIR SHARE OF INTERSTATE TELECOMMUNICATIONS ACTIVITY.

A. Apportionment Is Not Required Unless It Is Shown To Be Practicable.

GTE Sprint argues that a tax on telecommunications must be apportioned according to "that portion of Illinois transmission activity and costs involved in a long distance call, while protecting substantial non-Illinois transmission activity and costs from taxation." (GTE Sprint Br. 30.) For the reasons discussed above, it is virtually impossible to devise an apportionment formula that fairly reflects the involvement of each State affected by every individual interstate telephone call. The technological reality is that calls are transmitted by different modalities (satellite, microwave, fiber-optic cable etc.), some of which require the use of physical facilities in some or all of the States traversed and others of which do not involve significant contribution by the States whose paths are crossed by the telecommunication.

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11 *(Continued)*

Br. 29-31) on the requirement of "external consistency" imposed on State methods of apportioning the net income realized by a taxpayer from activities throughout the nation. *See Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 169 (1983). It is unclear whether or how this requirement might apply to taxes on something other than net income (for which some sort of largely artificial apportionment mechanism is inherently necessary to divide an indivisible quantity among multiple jurisdictions). However, if that requirement does apply to sales taxes or equivalent gross receipts taxes, the cases just discussed necessarily establish that apportionment by the volume of sales made to the taxing State satisfies that requirement.

See generally, W.J. Blyth and M. Blyth, *Telecommunications: Concepts, Development, and Management* 85-113 (1985). Thus, for example, the path of a microwave communication may pass through a State between microwave relays in adjacent States without utilizing any actual facilities in the intermediate State. Other communications bypass any intermediate States by use of satellites outside the territory of any State, so that any allocation of that contribution among States would, of necessity, be purely arbitrary. The upshot is that even if one could determine the path of every telecommunication, an apportionment of the charge based on the distance traveled within each State would have only a minimal relation to the respective amount of activity involved in each of those States. *See Pan American World Airways, Inc. v. Virgin Islands*, 459 F.2d 387, 393-95 (3rd Cir. 1972)(making similar point regarding air travel). In sum, there is no way to apportion a single telecommunication meaningfully according to the involvement of States touched by a transmission.

The inappropriateness of requiring mathematical apportionment of individual telephone calls is underscored by the extreme practical obstacles to keeping track of the routes of the millions of calls transmitted yearly. As explained above, MCI has no existing means by which it could determine how any particular prior communication was routed or of recording the routing of a current communication and MCI does not believe that any other carrier has the ability to make such determinations or records. Yet, without such records, it is impossible even to determine which States (other than those of origin and destination) were involved in any communication, let alone to evaluate the degree of involvement of each State. Moreover, even were it technically possible to create records of the routings of all calls and to analyze them for the purpose of apportioning the charges and computing the tax on such of those calls, the time, equipment, and expense required would be staggering. As a result, MCI believes that such call-by-call apportionment would be utterly impracticable, if not truly impossible.

Fortunately, existing Commerce Clause jurisprudence accommodates taxation of technologies for which apportionment, other than that inherent in careful definition of the tax base (e.g. limitation to in-state sales), cannot be practically achieved. The Court reiterated last year that unapportioned taxes "may be perfectly valid when administrative difficulties make collection of more finely calibrated user charges impracticable. . . ." *American Trucking Associations, Inc. v. Scheiner*, 107 S. Ct. 2829, 2847 (1987).

This principle is illustrated by *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950), where the Court upheld a 2% tax on the fair market value of motor vehicles for the use of State highways. In that case, it was argued "that a tax on vehicle value should be forbidden . . .because it varies for each carrier without relation to road use." 339 U.S. at 545. The Court upheld the tax under the Commerce Clause, recognizing that "[c]omplete fairness would require that a state tax formula vary with every factor affecting appropriate compensation for road use" and that "we must be content with 'rough approximation rather than precision.'" 339 U.S. at 545, 546.

Similarly, in *Aero Mayflower Transit Co. v. Board of R.R. Commissioners*, 332 U.S. 495 (1947), the Court upheld State power to assess a $15 minimum fee on each vehicle operated by a motor carrier on the State's highways. It reasoned that the Constitution did not "require the state to elaborate a system of motor vehicle taxation which will reflect with exact precision every gradation in use." *Id.* at 506 n.19. The Court has explained this decision as "based on the costs the State would encounter in collecting taxes for vehicles that earned less than $3,000 annually in Montana. We also emphasized the administrative impossibility of precise apportionment according to road use in *Capital Greyhound Lines v. Brice*." *Scheiner*, 107 S. Ct. at 2847 n.26.

To be sure, *Scheiner* held that flat fees and taxes for use of a State's roads were no longer permissible because "[t]he administrative machinery of revenue collection for highways is now obviously capable of taking into account at least the gross variations in cost per unit of highway usage. . . ." *Id.* at 2847. Nonetheless, the Court emphasized that *Capitol Greyhound Lines*, *Aero Mayflower Transit*, and similar cases remain valid precedents for "their recognition that the Commerce Clause does not require the States to avoid flat taxes when they are the only practicable means of collecting revenues from users and the use of a more finely gradated user fee schedule would pose genuine administrative burdens." *Id.* (footnote omitted).

In sum, the Court has repeatedly "recognized that [administrative] . . .burdens may be sufficient to justify states in ignoring even . . . key factor[s]" that might be included in an analytically perfect apportionment. *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707, 716 (1972). That principle should be applied here, where apportionment of the tax on each individual call is obviously impracticable[12] and the method for allocating calls to Illinois for tax purposes is itself a proper method of apportioning the tax base among the States.

Appellants rely (Goldberg Br. 18, 21, 34; GTE Sprint Br. 10-12, 22,24 25, 30) heavily on *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948), in support of their contention that each call taxed must be apportioned to the portion of the transmission occurring within Illinois. In *Mealey*, the Court forbade New York to tax the entire gross receipts of a bus company for transporting passengers between points in New York over routes that lay largely in Pennsylvania and New Jersey. However, the Court reached that result only after noting that "[t]here is no dispute as to feasibility in apportioning this tax." *Id.* at 663, 662

[12] The summary judgment record below did not address the feasibility of apportionment of individual telephone calls. However, the challenger of the constitutionality of a tax bears the burden of clearly and cogently demonstrating all facts necessary to establish its invalidity. *Norton Co. v. Department of Revenue*, 340 U.S. 534, 537 (1951); *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 175-76 (1983). Thus, appellants were obliged to prove that apportionment is practicable before they could demand that one be made.

(proportion of mileage traveled in New York known to four decimal places). Moreover, the extent of the use made of the roads of one State by a given bus in this continuous transportation was, of necessity, almost exactly proportional to the mileage in that State, for the nature of the use was virtually identical.

Here, in contrast, the feasibility of apportionment is very much in dispute and there has been no showing of such feasibility. Not only are the paths of individual communications practically undeterminable, but even such determination would not eliminate the need to evaluate the disparate impacts of the wide variety of different transmission methods utilized in the respective States through which those communications pass. Under these circumstances, the applicable rule is that for situations where more precise apportionment is impracticable.

B. Illinois Has Taxed No More Than Its Fair Share of the Interstate Telecommunications Activity Connected to the State.

Moreover, even were it barely within the realm of practicality to make some more precise apportionment of individual calls, requiring such an apportionment would simply create substantial burdens which would serve no purpose in more fairly dividing the interstate tax base among the States or facilitating interstate commerce. A crude example would be for a State to tax 50% of the charges for each interstate call originating or terminating in that State, regardless of the location to which it is charged. Such a charge would be more complicated to administer than the Illinois tax, but there is no reason to believe that it would produce a significantly different distribution of revenue, for it is unlikely that the percentages of such calls charged to telephones in a given State is much different from the percentage charged to telephones elsewhere.

A more sophisticated apportionment would have each State tax its "proportionate share" (assuming that this proportion could even be determined) of every call originating or terminating in that State or transmitted in part through that State. Such an apportionment would presumably favor States, like Illinois,

which are centrally located and participate in the transmission of many calls between other States on either side. It should be obvious that any such tax would be an administrative nightmare. Moreover, even apart from the enormous costs of administration of such tax schemes, its adoption by Illinois would likely create a *greater* burden on interstate commerce than the present Illinois tax because of the tax which would be imposed on the great volume of calls (now untaxed by Illinois) transiting Illinois en route between other States.

In short, the Illinois tax reaches no more than a fair share of the total interstate telecommunications activity involving Illinois and uses the least costly and most practicable method of allocating a fair portion of that activity to itself. Especially in the absence of any showing that a more precise method of apportionment is practicable, the Illinois tax should be recognized as a proper application of the principle that "[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden. . . ." *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938). Because Illinois has demanded no more than its "just share," the challenged tax should be upheld against appellants' claims of inadequate apportionment.

III. THE ILLINOIS TAX CREATES NO IMPERMISSIBLE RISK OF MULTIPLE TAXATION

A. The Illinois Tax Is Internally Consistent and Many of the Alleged Risks of Multiple Taxation Result from Other Taxes Which Are Not Internally Consistent.

Appellants argue that the Illinois tax violates the Commerce Clause by creating a "risk of multiple taxation," as evidenced by its failing the test of "internal consistency." (GTE Sprint Br. 26-29). That test requires that "the formula [by which the tax is applied] must be such that, if applied by every jurisdiction, it would result in no more than all of the [charge on a single telecommunication] being taxed." *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 170 (1983).

The Illinois tax satisfies the internal consistency test, because if every jurisdiction adopted a telecommunication excise tax imposed on charges to the consumer's service address, each telecommunication would be taxed exactly once. Indeed, GTE Sprint, at least, concedes that "if every state passed a tax *identical* to the Illinois tax, it is true only one state would tax a long distance call. . . ." (GTE Sprint Br. 27.)

Appellants argue that there is nonetheless an impermissible risk of multiple taxation resulting from the coexistence of the Illinois tax with actual or hypothetical taxes that they characterize as similar to the Illinois tax. GTE Sprint, at least, contends that these taxes must be regarded as "like" taxes for purposes of the internal consistency test and that, if they are so regarded, the Illinois tax fails that test. (GTE Sprint Br. 26-29.) However, this contention reflects a fundamental misunderstanding of the rule laid down by the Court to balance Commerce Clause concerns against the need to allow for a wide variety of local tax structures. Moreover, many of the risks of multiple taxation on which appellants rely result, not from any defect in the Illinois tax, but rather from the failure of the (actual or hypothetical) other tax to satisfy the internal consistency requirement.

The Court has not applied the internal consistency requirement by seeking to define some class of "similar" taxes whose interactions with the tax in question must be considered. Rather, it has focused solely on the effects which would follow if other States adopted "the precise [tax] scheme" at issue. *Armco Inc. v. Hardesty*, 467 U.S. 638, 644 (1984). While Justice (now Chief Justice) Rehnquist opposed the imposition of this requirement, he too understood it to address only "the impact on interstate commerce if other jurisdictions employed *the same tax*." *Id.* at 648 (dissenting opinion) (emphasis added). *See also Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 107 S. Ct. 2810, 2816-20 (1987); *Id.* at 2826 (dissenting opinion); *American Trucking Associations, Inc. v. Scheiner*, 107 S. Ct. 2829, 2840 (1987); *Id.* at 2851 (dissenting opinion). Indeed, it is precisely the fact that the rule depends solely on the form of

the tax under consideration that it can be described as one of *internal* consistency. There no claim that the Illinois tax fails this test.

Rather, GTE Sprint argues that a broader analysis is necessary in order to prevent "other states which host and economically support significant transmission, billing, and purchase activity on [the same] call [from being] deprived of revenues based on those activities." (GTE Sprint Br. 27.) However, as shown at 20-21, *supra*, Illinois has not attempted to appropriate more than its fair share of the telecommunications activities which it "host[s] and economically support[s]," so that other States are left free to tax their own shares of the overall activity without subjecting interstate commerce to any undue or discriminatory burden.[13]

The lack of any need for a broader restriction is underscored by the efficacy of even the narrow restriction to prevent the sorts of multiple taxation that appellants purport to fear. Upon examination, many of those risks stem from the lack of internal consistency of the other taxes allegedly creating the multiple burden rather than from any defect in the Illinois tax.

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[13] Moreover, it would be an undue intrusion on State taxing power to adopt the sort of ill-defined broadening of the internal consistency rule advocated by GTE Sprint. As argued by the dissents in *Armco*, *Tyler Pipe*, and *Scheiner*, the propriety of the internal consistency rule itself was not entirely free from doubt. Presumably, the Court found those doubts outweighed by the rule's simplicity and ease of administration as well as by the severity of the risks of multiple taxation posed by internally inconsistent taxes.

However, extension of the rule to some ill-defined class of "similar" taxes will destroy both its simplicity (by requiring determination of what taxes must by considered similar) and its limitation to particularly severe risks of multiple taxation (because the broadening of the test will necessarily reach a broader class of risks). Since such broadening is unnecessary to protect either the freedom of interstate commerce or the taxing interests of other States, it would be improper to further constrain the permissible structures of State taxation.

One way in which a tax structure may lack internal consistency is to impose a single tax on multiple aspects of the same transaction, despite the fact that those aspects might occur in different States. Thus, in *Tyler Pipe,* the tax covered both manufacturing and sale in the taxing State, so that a given transaction would be subject to only one tax if both activities occurred in the same States but would be subject to two equivalent taxes if those activities occurred in different States. Many of the non-Illinois taxes relied upon by appellants have this defect.

For example, GTE Sprint discusses a hypothetical New York tax and an actual Washington tax which apply to all interstate calls originating or terminating in the taxing State and either Abilled or paid there (GTE Sprint Br. 35-36.) As GTE Sprint notes, "a call [between Illinois and New York] might be *charged* to a phone at the Illinois division of a New York corporation, but the bill *paid* at corporate headquarters in New York," resulting in double taxation of the same call. (GTE Sprint Br. 35 n. 14)(emphasis in original). The problem arises from the internal inconsistency of the hypothetical New York tax. If that tax were in effect in both Illinois and New York, and the call used in the example were billed to the Illinois division and paid in New York, the multiple taxation would occur because a single tax has been imposed on multiple aspects (here, billing and payment) of the same transaction. Thus, it is the hypothetical New York tax which is internally inconsistent. This problem occurs wherever a state utilizes multiple events, several of which may occur in a single transaction and in different States, to trigger the application of the tax.

The Illinois tax does not suffer from this problem, for any given charge can be made only to a single service address. Thus, under the Illinois scheme, such a charge can be subjected to only one tax. Obviously, where any multiple taxation results from the imposition by another State of an unconstitutional tax, that should not impair the validity of the internally consistent and otherwise proper Illinois tax.

B. Any Risk of Multiple Taxation Which Might Result from the Illinois Tax Is No Different from the Unavoidable Risks Which Result from All Variations in State Apportionment Schemes.

Even if another State's tax avoids the pitfall of internal inconsistency, it is still possible that some calls taxed by Illinois might also be subjected to taxation by another jurisdiction which taxes an appropriate share of the interstate telecommunications activity affecting it but arrives at that share in a different manner. The most obvious way (and the most significant one illustrated by any of the actual taxes cited by appellants) would be for a State to tax calls on the basis of where they are billed instead of the location of the service address where they are charged.

Apart from the possibility of a credit against one tax or the other, see discussion at 29, *infra*, there are two ways of disposing of this problem. First, it is arguable that use of the billing address (rather than the service address) is itself improper. Second, and more fundamentally, any multiple taxation resulting from this sort of an overlap does not result from any discrimination against interstate commerce, but is the sort of inevitable result of varying State apportionment mechanisms which the Court has previously held permissible. *Moorman Manufacturing Co. v. Bair*, 467 U.S. 267, 278 (1978).

The questionable propriety of using the billing address as the basis of taxation results from the requirement that a tax on interstate commerce be "fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 620-30 (1981). As the Court explained in *Commonwealth Edison*, "there is no requirement . . . that the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of the services provided to the activity." *Id.* at 622. Rather, "'[t]he only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes.' "

Id. at 623, quoting *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 521-23 (1937). Thus, the requirement of a fair relationship to the benefits provided by the State requires that "the *measure* of the tax must be reasonably related to the extent of the contacts. . ." between the State and the activity of the taxpayer on which the tax is imposed. 453 U.S. at 626.

Measuring a tax by the purchase price of the telecommunications charged to a service address within the taxing State clearly satisfies the requirement of fair relationship to services, for the measure is based on the taxpayer's use of the telephone(s) located at that address and thereby relates to the value of such services as the police and fire protection afforded to that service address and the telephone(s) located there.[14] *See D.H. Holmes Co. v. McNamara*, 56 U.S.L.W. 4400, 4402 (1988) (Tax on distribution of catalog to in-state customers upheld on basis of relationship to protections afforded to taxpayer's in-state stores).

[14] A fundamental error running throughout appellants' argument is the persistent claim that the tax is invalid unless proportioned to the protections which Illinois provides to the interstate telephone network, completely ignoring the role of the tax as a measure of the protections provided to the taxpayer at the Illinois service address. That error leads to the mistaken claim that, like the flat tax for road use in *American Trucking Associations, Inc. v. Scheiner*, the Illinois tax bears more heavily on interstate commerce (for which only a portion of the transmission occurs in Illinois) than on intrastate commerce (where the entire transmission occurs in Illinois). However, the vice of the tax in *Scheiner* was its tendency to place a disproportionate burden on out-of-state truckers, who (the evidence showed) had far less occasion to utilize the privileges for which the flat fee was levied. Thus, the tax in *Scheiner* discriminated in the sense that it "favor[ed] in-state business over out-of-state business for no other reason than the location of its business." 107 S. Ct. at 2841. There is no evidence tending to show that the Illinois telecommunications tax has any similar tendency. To the contrary, the analysis set forth in this brief shows that the Illinois tax is designed in a manner which places the entire burden on taxpayers with Illinois service addresses in proportion to their respective Illinois activities, so that there is no danger of shifting the tax burden to out-of-state interests.

On the other hand, if a taxpayer were to elect to pay all its bills from a centralized location, the bills paid necessarily reflect all of its activities throughout the nation, and would not appear to constitute a fair measure of the services provided by the taxing State. Use of the billing address would also allocate an unfair share of the tax base to States with concentrations of corporate headquarters offices rather than to the States where the corporate operations and telephones are located. Thus, use of the billing address as the basis of taxation appears significantly less proper than use of the service address.[15]

More fundamentally, the overlap in taxation arising from variations among State tax schemes is inevitable whenever different States use different apportionment mechanisms. If all of the apportionment mechanisms are individually fair, then the variations will largely cancel one another out. Thus, if another State bases taxation on the billing address and Illinois bases it on the services address, then calls billed to the other State but charged to an Illinois service address will be taxed twice. However, if the billing and service addresses are reversed, there would be no tax at all. While particular transactions might suffer multiple taxation, interstate commerce as a whole would pay no more than its fair share and would suffer no undue burden.

This analysis is part of the basis of the Court's express holding in *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267 (1978), that the risk of multiple taxation arising out of differences among

[15] To be sure, by use of credit cards, calls may be charged to a service address even though none of the phones at that address are involved in those calls. Nonetheless, use of the telephone even as a basis for billing is a measure of the utility of that phone to the purchaser. This will be especially true if the purchaser has no other phones to which the call might have been charged or if charging calls to the particular phone assists in allocating them to particular customers or operations. Moreover, because credit card calls are generally more expensive than direct dialed calls, purchasers are unlikely to use credit cards unless making calls from phones other than their own. In contrast, there are no significant costs associated with directing bills to a location different from the service address.

State apportionment schemes does not render a state tax invalid under the Commerce Clause. *Moorman* upheld the validity of the Iowa single-factor formula employed to apportion income of interstate businesses for income tax purposes, even though forty-four of the forty-five States other than Iowa imposing such a tax utilized a different apportionment formula, and the differences resulted in some duplication of Iowa's taxation.

The Court explained that such duplication does not amount to constitutionally impermissible multiple taxation:

> The only conceivable constitutional basis for invalidating the Iowa statute would be that the Commerce Clause prohibits any overlap in the computation of taxable income by the States. If the Constitution were read to mandate such precision in interstate taxation, the consequences would extend far beyond this particular case. For some risk of duplicative taxation exists whenever the States in which a corporation does business do not follow identical rules for the division of income . . . .
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> * * * *
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> The prevention of duplicative taxation, therefore, would require national uniform rules for the division of income. Although the adoption of a uniform code would undeniably advance the policies that underlie the Commerce Clause, it would require a policy decision based on political and economic considerations that vary from State to State. The Constitution, however, is neutral with respect to the content of any uniform rule . . . .
>
> While the freedom of the States to formulate independent policy in this area may have to yield to an overriding national interest in uniformity, the content of any uniform rules to which they must subscribe should be determined only after due consideration is given to the interests of all affected States. It is clear that the legislative power granted to Congress by the Commerce Clause of the Constitution would amply justify the enactment of legislation requiring all States to adhere to uniform rules for the division of income. It is

> to that body, and not this Court, that the Constitution has committed such policy decisions.

Id. at 278-80.

So too here, particularly since no apportionment scheme allegedly superior to that utilized by Illinois has been shown to be feasible, the Court should not strike down the Illinois tax.

C. Illinois Has Provided Additional Protection Against Actual Multistate Taxation By Offering a Credit for Taxes Paid to Any Other State on a Call Taxed by Illinois.

For the reasons set forth above, limitation of the tax base to interstate calls both originating and terminating in Illinois and charged to an Illinois service address provides adequate protection against any undue burden on interstate commerce. However, Illinois has taken the further step of granting a credit against the tax previously paid to Illinois to any taxpayer who pays taxes in both Illinois and another State on the same call.[16] Act § 4. The credit is equal to the full "amount of such tax properly due and paid in such other state." *Id.*

Appellants object to this credit as a protection against actual multiple taxation because it cannot, except by accident, fairly divide the revenues from a given call among the States involved in transmission of that call. (Goldberg Br. 26; GTE Sprint Br. 15, 41-42.) This is true, but irrelevant, for call-by-call apportionment is not constitutionally required.

Appellants also complain that the standards for granting the credit are ill-defined and the procedures necessary to claim it are unduly burdensome. (Goldberg Br. 4, 26-27; GTE Sprint Br.

[16] It is true that this credit would not protect against imposition of taxes by multiple States on different taxpayers. (Goldberg Br. 11, 23.) However, the tax is laid on the amount paid by the purchaser of the call, and there is almost never more than one purchaser paying a given charge. Consequently, this risk seems remote, at best. Moreover, if this situation does somehow arise and each of the other taxes involved is fairly apportioned, there would be no undue burden on commerce for the reasons explained at 25-29, *supra*.

15-16, 42-44.) However, as the State of Illinois correctly pointed out (Consolidated Mo. to Affirm 13 n.5), the alleged inadequacies of the credit mechanism cannot properly be evaluated on this record, which neither shows any actual instance of multiple taxation nor any actual attempt to invoke that procedure.

CONCLUSION

For the reasons stated, the judgment of the Illinois Supreme Court should be affirmed.

Respectfully submitted,

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